

REMAND ISSUES

1. WHETHER THE PROJECT SHOULD PROPERLY BE CHARACTERIZED AS A MODERATE DENSITY USE OR A MEDIUM DENSITY USE;
2. FULLY ADDRESS THE POLICY UNE-2.6.1 “SPECIAL CARE SHOULD BE TAKEN TO PROTECT THE EXISTING LOW-SCALE RESIDENTIAL USES ALONG AND EAST OF 10TH STREET NE”;
3. DETERMINE, IN LIGHT OF THE COMMISSION’S CONCLUSIONS ON (1) AND (2), WHETHER TO GRANT OR DENY APPROVAL OF THE PROJECT; AND
4. EXPLAIN THE COMMISSION’S REASONING IN GRANTING OR DENYING APPROVAL.

ISSUE 1: IS THE PROJECT A MODERATE OR MEDIUM DENSITY USE?

- PUD Rezoning

Commission must find it not inconsistent with the Comprehensive Plan

- 11 DCMR § 2403.4 and

- D.C. St. § 6-641.02

- Comprehensive Plan Framework Element [2-1]

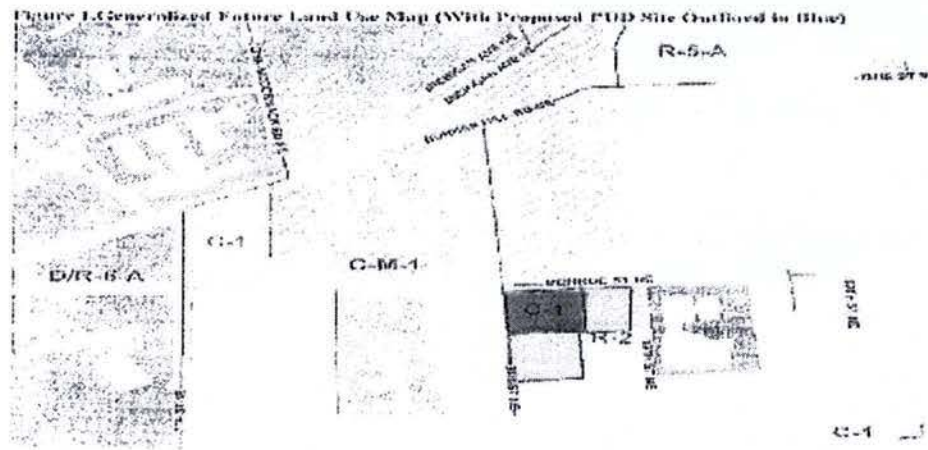
FLUM carries the same legal weight as the text of the Comprehensive Plan and shows the general character and distribution of recommended and planned uses across the city.

PROJECT:

- 6.5 FLOOR RESIDENTIAL APARTMENT BUILDING AT 60'8"
- GROUND FLOOR RETAIL ALONG MONROE STREET
- 6% COMMERCIAL
- 94% RESIDENTIAL

Project Land Use Categories

- Majority (62.5%) of the property – low-density residential (yellow)
- Minority (37.5%) of the property – mixed use/lower-moderate density (orange)





A09 AERIAL PERSPECTIVE FROM THE SOUTH LOOKING NORTH

ESOCOFF & ASSOCIATES | architects

16 NOVEMBER 2010

COURT OPINION - ANALYSIS

“...the project would appear to be a **medium-density** residential use, because it would stand six stories high and offer over two hundred apartment units.

The Commission’s Explanation of its decision to approve the project relies heavily on the premise that the project would be a **moderate-density** use.” [P. 16]

COURT OPINION - DEFINITIONS

“...the FLUM defines moderate-density residential use as applying to the District’s row house neighborhoods, as well as its low-rise garden apartment complexes. The designation also applies to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings.”

10-A DCMR § 225.4. “Although moderate-density residential neighborhoods may include ‘existing multi-story apartments,’ such structures were typically ‘build decades ago when the areas were zoned for more dense uses (or were not zoned at all).’ *Id.* In contrast, the FLUM defines medium-density residential use as applying to ‘neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use.” 10-A DCMR § 225.5. [P. 15-16]

Comprehensive Plan Citywide Elements FLUM [2-33]

Future Land Use Map and Categories 225

Purpose of the Land Use Map

The Future Land Use Map is part of the adopted Comprehensive Plan and carries the same legal weight as the Plan document itself. The Map uses color-coded categories to express public policy on future land uses across the city.

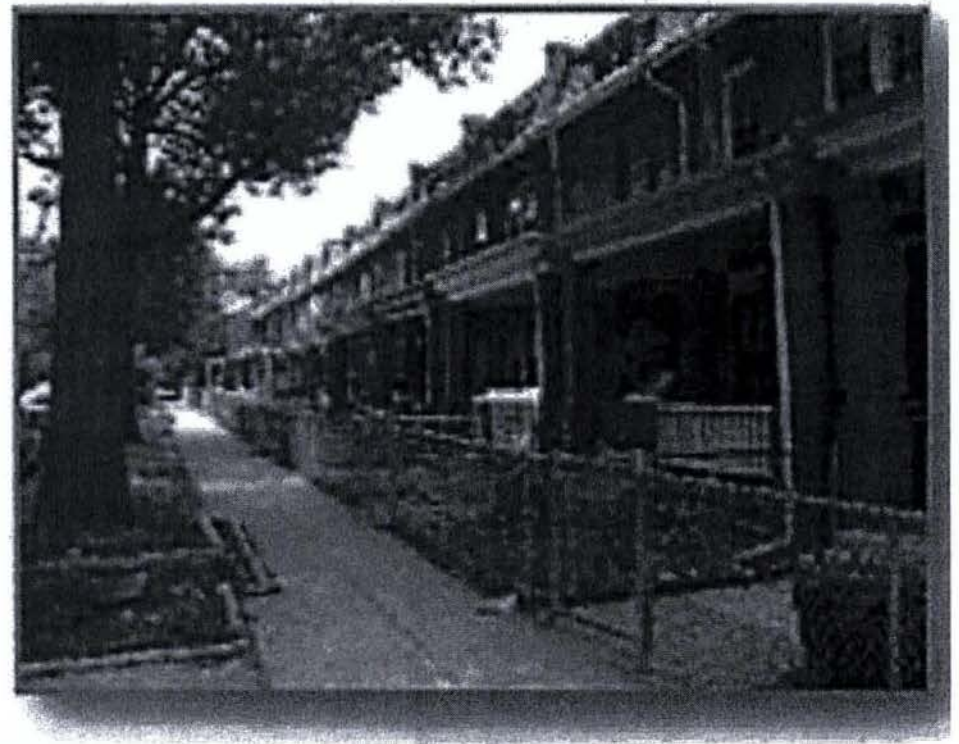
Definitions of Land Use Categories

Residential Categories

Four residential categories appear on the Future Land Use Map, as follows: 225.2

Low Density Residential: This designation is used to define the District's single family neighborhoods. Single family detached and semi detached housing units with front, back, and side yards are the predominant uses. The R-1-A, R-1-B, and R-2 Zone Districts are generally consistent with the Low Density Residential land use category, although other zones may apply. 225.3

Moderate Density Residential: This designation is used to define the District's row house neighborhoods, as well as its low-rise garden apartment complexes. The designation also applies to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings. In some of the older inner city neighborhoods with this designation, there may also be existing multi-story apartments, many built decades ago when the areas were zoned for more dense uses (or were not zoned at all). The R-3, R-4, R-5-A Zone districts are generally consistent with the Moderate Density Residential category; the R-5-B district and other zones may also apply in some locations. 225.4



Moderate Density Residential

Medium Density Residential. This designation is used to define neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use. Pockets of low and moderate density housing may exist within these areas. The Medium Density Residential designation also may apply to taller residential buildings surrounded by large areas of permanent open space. The R-5-B and R-5-C Zone districts are generally consistent with the Medium Density designation, although other zones may apply. 225.5



Medium Density Residential

200 FOOTERS' PROPOSED FINDINGS ¶¶88-90

- ¶ 90 - The Project would extend what is a predominantly Medium Density Residential use into an area the majority of which is recommended on the FLUM for continuation of Low Density Residential use. Because the FLUM is to be interpreted with a degree of flexibility, the Commission, in considering a PUD-based rezoning request, may have limited discretion to allow the minor incursion of a medium-density use into FLUM-designated Low Density Residential use land. But allowing such an incursion for a majority of the property would be tantamount to open disregard of the land use designations on the FLUM, designations whose importance is re-emphasized in considering residential infill development in the Upper Northeast Area. (See UNE-1.1.2). The Commission finds that the proposed PUD-related Zoning Map amendment to the C-2-B Zone District is inconsistent with the Property's designation on the FLUM. The Commission further notes that the Applicant's and OP's claim that the C-2-B Zone District is "congruent" with both the Moderate-Density Commercial Land Use category and the Medium-Density Commercial Land Use category in the Comprehensive Plan. (See Future Land Use Map and Categories, § 225.8 and 225.9) is incorrect factually and of no legal consequence in any event, as the Commission cannot lawfully a "congruence" standard in evaluating a PUD rezoning request.

Arguments For Ignoring FLUM

1. Not parcel-specific and no specific development standards and not a zoning map.

RESPONSE: FLUM sufficiently detailed for guidance at least at square level. 11 DCMR § 226.c.

True for Square 3829

2. FLUM must be interpreted in conjunction with text of Comprehensive Plan

RESPONSE: Here, this leads right back to compliance with FLUM

LU-1.3.1 – FLUM is the guidance for density in vicinity of Metro Stations

UNE-1.1.2- Residential infill should be consistent with FLUM land use designations

3. Commission has discretion to approve PUD-rezoning with flexibility to depart from FLUM limitations. 11 DCMR § 226.c.

RESPONSE: Yes, FLUM not a straight-jacket.

Square 3829 part-low and part-moderate density,
if compatible, moderate-density PUD project could bleed
over into low-density areas on FLUM.

Leapfrogging from low to medium? NO

Statutory command of Comprehensive Plan consistency
D.C. Stat. § 6-641.02 rendered meaningless

4. Commission has discretion to rely instead on “competing policies” in Comprehensive Plan

RESPONSE: FLUM consistency is a requirement of D.C. law.
Should be adhered to absent an irreconcilable conflict.

Alleged competing policy – encourage transit-oriented mixed-use near Metro Stations.

No irreconcilable conflict. No record evidence this policy cannot be furthered with a less dense and intrusive redevelopment of Square 3829. OP initially recommended PUD rezoning to C-2-A

ISSUE 2: ADDRESS UNE -2.6.1

Special care should be taken to protect the existing low-scale residential uses along 10th Street

Development On Square 3829 at Project Approval:

--SIX 10TH Street single-family residences to be dwarfed by the project

--FIVE single-family residences to be razed - 3 on 10th St.



Orange – To be Razed; Yellow - Existing

Court of Appeals Remand Opinion:

“At first blush, it is difficult to see how approval of a project that requires the tearing down of five residences along 10th Street and the erection of a six-story building next to six other residences is consistent with taking special care to protect those residences.

* * *

...we recognize that taking special care to protect something does not require protection at all costs, no matter how great. Nevertheless, we conclude that the Commission did not give adequate consideration to the policy favoring special care for the residences along 10th Street.” [P. 20-21]

How Is The Commission Supposed to “Take Special Care”?

“We assume that if showing special care for the residences along 10th Street would preclude the Commission from advancing the other policies relied upon by the Commission, then the Commission could resolve the conflict by deciding to advance other policies rather than to show special care for the residences along 10th Street. In other words, we assume that the policy favoring special care for the residences along 10th Street does not flatly bind the Commission. Even so, the Commission does not say that the only feasible way to advance other important policies would be to tear down five residences along 10th Street and build a six-story building next to six of the remaining residences.” [P. 21]

The Commission does say that tearing down the residences would be ‘necessary in order to complete the Project,” but that is quite different from concluding that the project – or one like it that had a similar impact on the residences on 10th Street – would be the only feasible way to advance the other policies the Commission relies upon as supporting approval of the project. Put differently, **the Commission has not explained why the various policies at issue conflict so as to require a trade-off among them.**

[P. 21-22]

The “various policies at issue” do not conflict

FLUM controls density

-- in vicinity of Metro Stations (LU-1.3.1)

-- for residential infill here (UNE-1.1.2)

“Special Care” language in UNE 2.6.1 preceded by the following:

“Encourage moderate density mixed use development on vacant and underutilized property in the vicinity of the Brookland/CUA Metro Station”.

Proposed 200 Footers' Order ¶¶76-78

Considers all elements bearing on density of development in proximity to the Brookland/CUA Metro Station

LU-1.3, LU-1.3.1, and LU-1.3.5 – Encouraging development around Metro Stations respecting character and scale of adjacent neighborhoods, and “a ‘stepping down’ down of densities with distance away from each station , protecting lower density uses in the vicinity.”

UNE – 1.1.3 and 2.6.1 – Encourage neighborhood compatible transit-oriented housing and moderate density mixed use development

Conclusion: These policies readily harmonized in favor of moderate density mixed use redevelopment in Square 3829.

Where is the evidence that the “only feasible way” to achieve mixed use development in Square 3829 is with medium rather than moderate density?

OP Supported moderate and PUD-rezoning to C-2-A.

200 Footers went on record to support that outcome.

Applicant recognizes only moderate density is consistent with Comprehensive Plan.

Repeatedly used “moderate” instead of “medium” in its proposed findings, as Court of Appeals noted.

“Medium” by any other name is still “MEDIUM”.

ISSUE 3: With Issues 1 and 2 Resolved,
Should the Project be Approved or Denied?

The Commission should reject magical
effort to convert a medium density
project into a moderate density project
and DENY approval.

ISSUE 4: Explain Commission Reasoning In Deciding the Case

Resources:

- Two competing Proposed Orders – Summer of 2013. Many of 200 Footers' Findings and Conclusions mirror Applicant's.
- Differences are highlighted in 200 Footers' 14-page identification of errors in applicant's Proposed Order.
- Court of Appeals' Opinion in *Durant II*—makes clear pivotal issues must be resolved.

The Commission should NOT ADOPT
VERBATIM either Proposed Order.

The Commission should take note of where
the two Proposed Orders differ, and decide
which Order is correct, which Order is
incorrect; and explain why that is so.

DENIAL is the proper result here.

The Commission should leave open the door
for revising the project into a genuine
moderate density development – at the
highest zone in Brookland east of the tracks:
C-2-A.